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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

Nos. ~~750 and [illegible]~~ 56 80

The Hon. Francis L. Van Dusen, etc., et al.,
Petitioners

v.

Roberta Barrack, Administratrix, etc., et al.,
Respondents

## BRIEF OF RESPONDENTS HOWARD H. RAPP, ADMINISTRATOR, ET AL., IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

NOS. 738 AND 851

**The Hon. Francis L. Van Dusen, etc., et al.,**
**Petitioners**

**v.**

**Roberta Barrack, Administratrix, etc., et al.,**
**Respondents**

## BRIEF OF RESPONDENTS HOWARD H. RAPP, ADMINISTRATOR, ET AL., IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

## OPINIONS BELOW

1. The opinion of the District Court appears at:
(a) Petition No. 738, App. A. pp. 1a et seq. and
(b) Petition No. 851, App. pp. 2a et seq. and
(c) 204 F. Supp. 426.

2. The unamended opinion of the Court of Appeals appears at:
(a) Petition No. 738, App. B, pp. 26a et seq. and
(b) Petition No. 851, App. pp. 27a et seq. and
(c) 309 F. 2d 953.

3. The order of the Court of Appeals amending said opinion appears in the Appendix to this brief at pp. 1a-3a hereof and is not yet otherwise reported.

## JURISDICTION

Petitioners invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

May a District Court order an action transferred to a district in which plaintiff fiduciary is not qualified to bring it?

*Answered in the negative by the Court of Appeals*

## STATUTE INVOLVED

Section 1404(a) of the Judicial Code, 62 Stat. 937, 28 U.S.C. § 1404(a), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

## STATEMENT OF THE CASE

**1. The Identity of the Parties.**

*The Petitioners are:*

(a) Various corporations and the United States, all of whom are defendants in certain actions for wrongful death brought by Respondents; and

(b) The learned Judge of the United States District Court for the Eastern District of Pennsylvania who ordered those wrongful death actions transferred

from his Court to the United States District Court for the District of Massachusetts.

*The Respondents are:*

Various executors or administrators who, on behalf of the estates of their respective decedents, instituted the above-mentioned actions for wrongful death against the corporate and governmental Petitioners.

**2. The Decision of the Court of Appeals which Petitioners now ask this Court to Review.**

The defendant Petitioners here ask this Court to review that decision of the Court of Appeals for the Third Circuit which held that a writ of mandamus should issue to vacate the District Court's order transferring the subject wrongful death actions to the United States District Court for the District of Massachusetts.

The Court of Appeals so held upon the ground that the subject actions might not have been brought in the District of Massachusetts.

**3. The Facts of Record upon which the Court of Appeals so Decided.**

Each plaintiff Respondent is a citizen of Pennsylvania and a resident of the Eastern District of said state.

Each of plaintiff Respondents' decedents died in the crash of an airplane in Boston, Massachusetts, on October 4, 1960, for which deaths these actions are brought.

Each of plaintiff Respondents' decedents died a resident of Pennsylvania with all of his assets located in Pennsylvania.

Each plaintiff Respondent is a fiduciary duly appointed by a Register of Wills of Pennsylvania. Two represent intestate estates (Rapp and Frankenfield), and two administer testate estates (Scott and Biernbaum).

No plaintiff Respondent has even been appointed or licensed as such fiduciary by any officer or agency of Massachusetts.

With the exception of actions in the Courts of Common Pleas of Philadelphia, since discontinued without prejudice by agreement, no plaintiff Respondent of this group has brought an action with respect to his decedent in any court other than the United States District Court for the Eastern District of Pennsylvania.

Nevertheless, in the United States District Court for the Eastern District of Pennsylvania, the defendant Petitioners moved to transfer each of said actions to the United States District Court for the District of Massachusetts and, after argument, said motions were granted by the District Court and the order of transfer mentioned above was entered. This is the order which the Court of Appeals vacated.

**4. Why These Actions Could Not Have Been Brought in Massachusetts.**

(a) The capacity of a representative plaintiff to sue in the United States District Court is to be deter-

mined by the law of the state in which the District Court is held. Fed. R. Civ. P. 17(b).

(b) Under Massachusetts law an action for wrongful death must be brought within one year (Mass. Ann. Laws, ch. 229, § 2) and may be brought only by the decedent's executor or administrator (Mass. Ann. Laws, ch. 229, § 2).

(c) Under Massachusetts law, an administrator appointed in another jurisdiction does not have the right to bring an action under the Massachusetts death statute. *Boutillier* v. *Wesinger,* 322 Mass. 495, 78 N.E. 2d 195 (1948).

(d) In order to have the right to bring an action in Massachusetts, each of these fiduciaries would have had to petition the Probate Court of Massachusetts for a license to do so, making the commissioner of corporations and taxation a party to said petition and giving him 14 days' notice thereof (Mass. Ann. Laws, ch. 204, § 3). The Probate Court might or might not eventually have seen fit to grant said petitions. See *Morgan* v. *Morgan,* 267 Mass. 388, 166 N.E. 747 (1929).

(e) Two of the instant actions, namely, the *Frankenfield* case and the *Scott* case, were commenced in the United States District Court for the Eastern District of Pennsylvania less than 14 days before the expiration of one year from the date of death, and therefore not only was it impossible for these actions to have been brought in Massachusetts

on that date but it was also by then impossible for the plaintiffs to have obtained the necessary license even had they been obliged to try to do so.

**5. The Respective Positions of the Parties Before this Honorable Court.**

*The Petitioners claim that:*

The decision of the Court of Appeals vacating the order of transfer was erroneous and certiorari should be granted because that decision is:

(a) contrary to the purpose and spirit of 28 U.S.C. § 1404(a) and in nullification of it in some disaster cases; and

(b) without support in, and indeed contrary to, previously decided cases.

*The Respondents claim that:*

To the contrary, the decision of the Court of Appeals is correct and is:

(a) required by and in full accord with the letter and intent of 28 U.S.C. § 1404(a) and prior decisions of this and other courts; and

(b) involves no substantial matters of principle or policy.

**6. The Nature of this Brief.**

This brief is respectfully presented on behalf of plaintiff Respondents Rapp, Biernbaum, Frankenfield and Scott in opposition to the petitions for writs of

certiorari upon the grounds set forth above, i.e., that the decision of the Court of Appeals that these actions might not have been brought in Massachusetts and therefore should not be transferred there was correct and in full accord with the letter and spirit of the statute and prior cases.

To avoid repetition, this brief does not make the arguments made by other plaintiff Respondents which relate to the convenience of the parties and the interests of justice although these Respondents fully join in and approve of those reasons also as establishing the impropriety of a transfer of the subject cases to Massachusetts.

## ARGUMENT

### 1. The Decision of the Court of Appeals Denying Transfer is that Required by the Statute Involved and by Prior Decisions of This and Other Courts.

The subject statute provides as follows:

> "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

The Court of Appeals concluded and the defendant Petitioners do not deny that under the law of Massachusetts, summarized above in this brief at pp. 4-5, the instant actions could not have been brought in Massachusetts because the plaintiff Respondents

were not, and in some instances because of the time limitations could not have been, qualified to bring them there.

Defendant Petitioners cannot deny this conclusion but seek instead to avoid it by contending that this Court should hold that the words "where it might have been brought" in Section 1404(a) refer only to the requirements of venue and jurisdiction in personam.

Such a contention is a novel one which has no support in the cases and in support of which defendant Petitioners cite no authority.

This Court, in the recent case of *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), considered two separate appeals which raised the question of whether a Federal District Court might properly transfer actions before it "to a district in which the plaintiff did not have a *right* to bring it". 363 U.S. at 336 (emphasis by the Court). In holding that the District Court had no such power, this Court said:

> "We do not think the § 1404(a) phrase 'where it might have been brought' can be interpreted to mean, as petitioners' theory would require, 'where it may now be rebrought, with defendants' consent.' . . . [T]he power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff . . . ." 363 U.S. at 342-344.

Here, as defendant Petitioners concede, these actions could not have been brought in Massachusetts by these plaintiff Respondents in the absence of a waiver by defendant Petitioners of certain defenses available to them. This is precisely the situation considered and decided by this Court in *Hoffman* v. *Blaski*.

Commenting on the distinction the Petitioners are asking this Court to make, the Court of Appeals said in its decision in this case:

> "[Petitioners] would limit the holding in *Hoffman* v. *Blaski, supra,* to the requirement that the transferee forum have both venue and jurisdiction of the cause. . . .
>
> "We think that the holding in *Hoffman* v. *Blaski, supra,* compels the conclusion that [the Court below] was without power to transfer these actions. The import of that decision is that unless the plaintiff had an unqualified right to bring suit in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). Hence, the fact that at oral argument counsel for intervenors expressed a willingness to waive any objection to petitioners' capacity to sue in Massachusetts is beside the point. Nor can the district court's statement that these actions involve the legal fiction of the appointment of a personal representative be used as a basis for distinguishing them from *Hoffman* v. *Blaski, supra.* Certainly, the requirement of capacity to sue is no more a legal fiction than is the necessity for having proper venue. Obviously, it, like venue, can be waived. Rules

> 9(a) and 12(h), Fed. R. Civ. P. But waiver or the possibility of waiver did not alter the Supreme Court's conclusion in *Hoffman*. In short, we can perceive no basis in either logic or policy for making any distinction between the absence of venue in the transferee forum and a prospective plaintiff's lack of capacity to sue there." 309 F. 2d at 956-957.

Defendant Petitioners further assert that plaintiff Respondents' claim of lack of capacity is a "technicality without real substance" because, say Petitioners, qualification in Massachusetts is a "mere formality". (Government Petition, p. 9).

But as Massachusetts law makes clear, this formality is anything but "mere". Plaintiff Respondents are individuals suing in their representative capacities, and under the law of Massachusetts, if an administrator or executor appointed in another state brings suit and the defendant or defendants to such suit move to dismiss, the motion must be granted. *Boutillier* v. *Wesinger*, 322 Mass. 495, 78 N.E. 2d 195 (1948), citing *Brown* v. *Boston & Maine Railroad*, 283 Mass. 192, 186 N.E. 59 (1933).

Both in the lower Courts and here defendant Petitioners have suggested that plaintiff Respondents could easily have qualified to bring suit and therefore the case ought now to be transferred. For this conclusion defendants rely on *Boudreau* v. *New England Transportation Co.*, 315 Mass. 423, 53 N.E. 2d 92 (1944), wherein a foreign administratrix was per-

mitted to amend her writ to show her subsequent ancillary appointment. But defendant Petitioners fail to point out that the defendant in the cited action did not avail itself of its right to have the action dismissed because of plaintiff's lack of capacity, just as in the *Hoffman* v. *Blaski* situation, had the suit been initiated in the proposed transferee forum where proper venue was absent, the defendant might have waived its objection to venue by failure to raise it.

In order for the administrator of a foreign decedent to obtain an ancillary appointment in Massachusetts, he must institute a separate and distinct action in the Probate Court. Mass. Ann. Laws, ch. 215, § 3.

In the case of an intestate, Section 1 of Chapter 193 of the Annotated Laws of Massachusetts applies and establishes, with respect to the identity of the person appointed, certain priorities which are normally respected, *Newhall Settlement of Estates and Fiduciary Law in Massachusetts,* § 47 (4th ed. 1958), but they are subject to the judgment of the Probate Court as to the suitability of the applicant.*

The requirement that the applicant be adjudged suitable by the Court is clarified by a number of authorities. In *Morgan* v. *Morgan,* 267 Mass. 388, 166 N.E. 747 (1929), the Supreme Judicial Court upheld

* Of the two plaintiff Respondents representing intestate estates now before the Court, Frankenfield, the decedent's widow, is within the priorities set forth in the statute, but Rapp, the administrator of the Zeller estate, is neither the surviving spouse, the next of kin or their guardian, nor a creditor.

the refusal of a Probate Court to appoint an intestate's widow as administratrix. In so doing it said:

> "The apparent purpose of this [statute] was to give the Probate Court a new discretionary power to consider the competency and suitableness of the petitioning party for the discharge of the trust. Upon the record presented to this court the decree dismissing the petition of Mrs. Morgan cannot be said to be wrong as a matter of law." 166 N.E. at 748.

Other cases to the same effect are *Petition of Davis*, 237 Mass. 47, 129 N.E. 366 (1921); *Black* v. *Dobbins*, 325 Mass. 587, 91 N.E. 2d 782 (1950); *Gordon* v. *Shea*, 300 Mass. 95, 14 N.E. 2d 105 (1938); see generally, *Newhall, supra*, § 47 at pages 172-3.

In the event that the non-resident died testate (as is the case of plaintiff Respondent Biernbaum's and Scott's decedents) the procedure for the appointment of an ancillary administrator in Massachusetts is set forth in Sections 9 and 10 of Chapter 192 of the Annotated Laws of Massachusetts. Under those provisions a judicial hearing shall be held after newspaper publication and a finding made by the Court as to the propriety of the proceedings.

Even in the case of an executor named in the will, there is no obligation that the Probate Court appoint him as representative in Massachusetts. There are numerous cases in which the Probate Court has refused to do so. E. g., *Osborne* v. *Craig*, 251 Mass. 169,

146 N.E. 263 (1925); *Martin* v. *Otis*, 233 Mass. 491, 124 N.E. 294 (1919); *Cogswell* v. *Hall*, 183 Mass. 575, 67 N.E. 638 (1903).

Still further, defendant Petitioners have not mentioned another aspect of these cases which bars transfer. Under the wrongful death statute of Massachusetts, which defendant Petitioners contend is the applicable law, the personal representative must bring the action within one year from the date of death;* this requirement is an integral part of the statute creating that right of action and is not a statute of limitations. Mass. Ann. Laws, ch. 229, § 2.

Each of these fiduciaries would have had to petition the Probate Court for a license to commence the actions and, in the case of a testamentary estate (e.g., plaintiff Respondent Scott), publication of such application must be given commencing at least 30 days before the hearing (Mass. Ann. Laws, ch. 192, § 9, 10), and in the case of an intestacy at least 14 days before the hearing (cf. Mass. Ann. Laws, ch. 204, § 3).

But two of the instant actions, *Frankenfield* (an intestacy) and *Scott* (testate estate), were commenced in the lower court less than 14 days before the expiration of one year from the date of death, and therefore it was by then impossible for petitioners to have obtained the necessary license even had they been

* All of plaintiff Respondents' decedents died on the date of the crash, October 4, 1960.

obliged to try to do so.* Nor could defendant Petitioners have waived their "right to raise the defense" for they had no such right—the limitation is of the right as well as of the remedy. *Bickford* v. *Furber*, 271 Mass. 94, 170 N.E. 796 (1930); *Crosby* v. *Boston Elevated Ry. Co.*, 238 Mass. 564, 131 N.E. 206 (1921).

Hence in no sense might these actions have been brought in Massachusetts.

Prior to *Hoffman* v. *Blaski*, only one decision dealt with the exact issue now before the Court, namely *Felchlin v. American Smelting and Refining Co.*, 136 F. Supp. 577 (S. D. Cal. 1955). In that case plaintiffs were executors appointed by the Superior Court of California. Their action was founded on a contract between their testator and defendants, jurisdiction being based on diversity of citizenship. Defendants moved under Section 1404(a) to transfer to Texas, and plaintiffs opposed, arguing that there had been no appointment of a personal representative capable of bringing suit in that state. The Court denied the motion to transfer and held:

> "[I]n all cases in which the doctrine forum non conveniens comes into play, it pre-supposes at least two forums in which the defendant is amenable to process and in which the plaintiff may bring the action."

* Respondent Scott was not appointed in Pennsylvania until October 2, 1961, one day before the expiration of such rights in Massachusetts.

But, said the Court, since plaintiffs did not have a right to bring the action in Texas, therefore, as a matter of law, the Court lacked the power to transfer the action to that District.

Of the *Felchlin* decision, the Court of Appeals in the instant case said:

> "Respondent and intervenors seek to distinguish *Felchlin* from the case at bar on the grounds that a suit by a foreign personal representative in Texas is a nullity, whereas in Massachusetts lack of capacity is a mere defense to the action and can be waived. However, we deem this distinction insubstantial, for whether lack of capacity precludes a prospective plaintiff from filing suit in the first instance, or subjects him to a dismissal at the instance of the defendant, the result is the same. In either case he does not have an unqualified right to sue." 309 F. 2d at 957.

Defendant Petitioners have suggested that plaintiffs Respondents might arrange for the appointment of third persons as ancillary administrators in Massachusetts, but to require that a third person bring a similar but different action in Massachusetts also is in contradiction of Section 1404(a). When Section 1404(a) speaks of "the action" it is not referring merely to a claim which one or more persons might have brought on behalf of interested parties; it is referring to an action in esse with a given plaintiff and a given defendant, as is shown by Rule 3 of the Federal Rules of Civil Procedure which provides in its entirety that:

"A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

Thus, by the terms of the Federal Rules themselves there is no action until a complaint is filed, and when it is filed it can only be identified in terms of the parties thereto in conjunction with the claim asserted.

To accept defendant Petitioners' suggestion would be to amend Section 1404(a) to read: ". . . where the claim already asserted by one party might have been asserted either by the same party, if he first obtained permission of the local court, or by an entirely different party. . . ."

This would be contrary to the statute on its face and as interpreted by this Court.

Thus, in considering a motion for transfer, a Court is required to consider the case before it, as it is and not as it might have been. Such a view precludes transfer in the instant cases.

**2. No Substantial Matters of Principle or Policy Are Involved.**

The Government expresses in its petition (pp. 11-12) the argument that the question of which it seeks review is "important . . . affecting as it does all representative actions". Plaintiff Respondents respectfully submit that the statement is not accurate.

That statement implies that all representative actions are brought in districts from which they should be transferred as a matter of convenience or justice.

This is of course without basis. It also implies that plaintiffs are without priority in their choice of forum. This too has no basis.

Defendant Petitioners argue that the decision below can only result in additional burdens on the Federal Courts. In support of this contention, the Government alleges (at page 11 of its petition in note 8) that as of the end of 1962 there were pending in various federal district courts 420 Federal Tort Claims Act cases arising from airplane accidents.* Aside from the fact that 420 (or 201) is but a very small fraction of pending Federal Tort Claims Act actions and a miniscule portion of the 69,295 civil actions shown in the Appendix (pp. 4a-5a) to be pending in all United States district courts, there is no suggestion that any or all of those actions are subject to motions or orders to transfer. The fact of the matter is that in many instances, as here, there are no compelling reasons for transfer.†

* See pp. 4a-5a of the Appendix hereto, a letter of March 13, 1963, from Administrative Office of the United States Courts, which states that as of December 31, 1962, there were pending in the district courts a total of 201 airplane tort actions against the Government.

† Aside from neglecting plaintiffs' rights as to choice of forum, from an over-all standpoint of administration of justice in the United States this argument of defendant Petitioners totally overlooks the fact that in the instant situation, as in others, there are pending suits in courts of states other than Massachusetts which cannot be removed to the Federal Courts, much less transferred by them, e.g., *Shackton* v. *Eastern Air Lines, Inc.*, (2 cases), C. P. No. 4, Sept. Term, 1961, No. 238 and C. P. No. 6, Sept. Term, 1961, No. 237 (Phila. Co.). Thus the issue of liability for this air crash will have to be litigated in Philadelphia and, perhaps, in other state courts.

Defendant Petitioners argue also that the decision below is in contradiction of the policies of this Court and Congress, but certainly it is not in conflict with the transfer statute, as considered above. Defendants' argument also ignores the policy of a majority of the states and *this Court* as articulated in the Federal Rules of Civil Procedure.

As set forth at considerable length in the petition in No. 738 (pp. 6 to 9 and notes 2 to 8) only seven states "permit a foreign fiduciary to obtain judgment in wrongful death actions by virtue of his foreign appointment" and only one permits such procedure in the case of other actions. Defendant Petitioners thus emphasize the fact that in this country there is an almost universal policy against suits by non-qualified foreign fiduciaries. Yet in the same document they argue that this Court should overturn a decision which respects this policy and should allow the transfer of actions into states where those actions could not have been initiated! To transfer these cases, brought by Pennsylvania administrators, to Massachusetts, a jurisdiction whose public policy is against litigation by non-qualified representatives, would be contrary to that policy and also to the doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938).

However, it is not necessary to rely on the obvious truth that the policy of the states merits respect. There is, for the purpose of considering petitions for writs of certiorari, an even more convincing argument—that

the decision below is consistent with the over-all policy of the Federal system.

This Court in 1938 promulgated the Federal Rules of Civil Procedure of which Rule 17(b), materially unchanged since then, provides expressly that the capacity of an individual acting in a representative capacity to sue shall be determined by the law of the state in which the district court is held.* The District Court in Massachusetts must look to the law of Massachusetts to determine the capacity of these plaintiffs to sue and the law of Massachusetts is (as defendant Petitioners concede) that a motion to dismiss an action brought by an out-of-state fiduciary shall be granted. Thus plaintiff Respondents are not qualified in that state and therefore these are not actions which "might have been brought" in the District of Massachusetts.

* "CAPACITY TO SUE OR BE SUED. . . . In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . ." Fed. R. Civ. P. 17(b).

## CONCLUSION

For the foregoing reasons the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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# APPENDIX

## UNITED STATES COURT OF APPEALS
### FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, ET AL.,
*petitioners*
*v.*
HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

POPKIN, ET AL.,
*petitioners*
*v.*
HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,003

RAPP, ADMINISTRATOR, ET AL.,
*petitioners*
*v.*
HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,011

BIERNBAUM, ET AL., EXECUTORS, ETC.,
*petitioners*
*v.*
HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,033

LAISTER, EXECUTRIX, ETC., ET AL.,
*petitioners*
*v.*
HONORABLE FRANCIS L. VAN DUSEN, ET AL.

Present: STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*.

It is ORDERED that the last paragraph on page 7 and concluding on page 8 of the opinion of this Court filed November 19, 1962, which reads:

> "What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside."

be and it hereby is amended to read as follows:

> What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Thus, with respect to these suits the district court's order of transfer was proper and will not be set

aside. Subsequently counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. With respect to these suits, therefore, we do not pass upon the question whether the district court's order of transfer was proper since it is not contested here.

By THE COURT

STALEY

*Circuit Judge*

Dated: February 21, 1963

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Law Librarian

Gentlemen:

The number of civil cases pending in all United States district courts on December 31, 1962 was 69,295.

On the same date the following tort actions were pending against the Federal government:

| | Number of Cases |
|---|---|
| Personal injury or death—airplane | 201 |
| Personal injury or death—motor vehicle | 1,023 |
| Personal injury or death—marine | 185 |
| Personal injury or death—other | 620 |
| Damage to personal property | 210 |
| Damage to real property | 113 |

Whether or not the Federal Tort Claims Act was mentioned in the complaint is not always reported to us. Therefore we can give you only the above figures by nature of suit.

Sincerely yours,

/s/ ORIN S. THIEL
Orin S. Thiel
Assistant Chief